IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1146 OF 2006

1. Alankar @ Veer Mohan Rawat
Aged about 18 years

2. Mohan Harishchandra Rawat
Aged about 42 years
Occ: Rickshaw Driver

3. Omkar @ Mithun Mohan Rawat
Aged about 21 years.
All residing at Room No.9, Mohan Rawat Chawl, Opposite Gurunanak Niwas, Irani Waid, Kandivali (E), Mumbai - 400 067.
At present undergoing the sentence imposed upon them at Mumbai Central Prison, Mumbai.
..Appellants (org.Accd.Nos. 1 to 3)

Vs.

The State of Maharashtra
(at the instance of the Senior Inspector of Police, Kandivali Police Station, Vide their C.R. No.410/2005)
..Respondent

WITH
CRIMINAL APPLICATION NO. 322 OF 2007
IN
CRIMINAL APPEAL NO. 1146 OF 2006

Alankar @ Veer Mohan Rawat and anr. ..Applicants

Vs.

The State of Maharashtra. ..Respondent

Mr. Nitin Sejpal with Ms. Pooja Bhojane for appellants.
Mrs. S.D. Shinde, APP for State.

CORAM : B.H. MARLAPALLE & R.S. MOHITE,JJ.

Reserved on : June 15, 2007.

Pronounced on : June 22, 2007.

JUDGMENT (Per R.S. Mohite, J.) :

1. This is an appeal filed by the appellants (hereinafter referred to as Accused Nos.1,2 and 3 respectively), impugning the Judgment and Order passed by the 5th Ad-hoc Additional Sessions Judge, Bombay in Sessions Case No.178 of 2006, convicting the accused for offences punishable under Sections 302, 504 read with Section 34 of IPC and on these counts sentencing them to undergo life imprisonment and to pay a fine of Rs.1000/- each, in default to suffer further RI for one year each. All the accused have further been convicted for an offence punishable under Section 502 read with Section 34 of IPC and on this count they have been sentenced to suffer RI for one year. It has been directed that all the sentences are to run concurrently and benefit of set off under Section 428 of Cr.P.C. has been given to all the accused.

2. The brief facts of the prosecution case were as follows:-

(a) That deceased Jitendra Rajaram Yadav was working as a watchman with Honest Security Services. On the date of the incident, which took place on 3/12/2005, he was performing the duty of security guard in a building known as "Gurunanak Niwas" situated on Hemu Kalani Cross Road No.3, Irani Wadi, Kandivali. His duty hours were 9 a.m. to 9 p.m. Deceased Jitendra was also residing along with his brother PW 2 Guddu Rajaram Yadav at a distance of about 20 minutes walk from the building where he was working.

(b) The accused persons belonged to one family and were residing in Room No.9 of a Chawl situated in a lane in front of the building Gurunanak Niwas. Accused No.2 Mohan Harishchandra Rawat was the father of accused no.1 Alankar and accused no.3 Omkar. On the date of the incident Alankar was aged about 18 years and Omkar was aged about 21 years. Their father Mohan used to ply an auto rickshaw and used to park the same in the lane. There parking of their auto rickshaw in the lane was a matter of dispute with the

members of the society because the same used to cause inconvenience.

(c) On 3/12/2005 at about 5 p.m. PW 2 Guddu Yadav was on his way to meet the deceased Jitendra. He was accompanied by one Shivkumar Yadav. When he reached near Gurunanak Niwas, he saw one rickshaw come in front of the gate of Gurunanak Niwas. He heard the voice of his brother Jitendra, asking the rickshaw driver not to park his rickshaw in front of the gate. The rickshaw driver i.e. accused no.2 Mohan started abusing the deceased Jitendra. PW 2 Guddu and Shivkumar told accused no.2 Mohan not to abuse the deceased Jitendra but they were threatened by Mohan. Two sons of Mohan i.e. accused nos.1 and 3 came running to the spot on hearing the altercations and started beating deceased Jitendra by giving fist and kick blows. Mohan also assaulted Jitendra. Jitendra tried to escape from the place by running away but Mohan caught him by his neck and his two sons beat him for about 10 to 15 minutes. PW 2 started shouting, but both the sons of Mohan threatened him. There was a crowd which had gathered there but nobody intervened

in the quarrel. Due to the beating, Jitendra, who was aged about 21 years, fell down on the ground. All the accused then left the place by rickshaw.

(d) It is the prosecution case that at about this time PW 3 Umesh Thakur, who was a security supervisor and who also was doing duty at Gurunanak Niwas building came there and he also witnessed the incident. After deceased Jitendra fell down, PW 2 Guddu and PW 3 Umesh took Jitendra in a rickshaw to Bhagwati Hospital but at the said hospital Jitendra was declared to be dead.

(e) The record indicates that at Bhagwati Hospital the Duty Constable recorded an Emergency Patient Register (EPR) entry. The said entry has been produced by the prosecution at Exh.36. What was stated in this entry was that three persons had assaulted the deceased and due to this he had fallen unconscious and had been brought to the hospital by Umesh (PW 3). It was further mentioned that on the injured being examined by the doctor it was found that he had expired. This EPR entry had been made between 6 p.m. and 6.20 p.m. on 3/12/2005.

(f) It appears from the record that after the making of this entry of EPR, information was passed on telephonically and the telephone call was taken by PW 8 PSI Raju Patil, attached to Kandivali Police Station. He made a station diary entry which reflects more or less the information as contained in the EPR entry mentioned hereinabove. PW 8 PSI Patil proceeded to the spot of the offence and on reaching there came to know that the injured had been taken to the hospital by his relatives. Police staff was kept at the spot of offence. PSI Patil learnt that the injured has been declared dead. He made a spot panchanama after calling two panchas and in the presence of API Ghadge, who had, in the meanwhile, recorded the F.I.R. of PW 2 Guddu and come to the spot. PSI Patil then prepared the map of the scene of offence. On the same day he arrested accused no.1 - Alankar under a panchanama and subsequently handed over the investigation to PW 10 PI Shivaji Shinde. PW 10 PI Shivaji Shinde was the colleague of PSI Gharge, who had recorded the F.I.R. of PW 2 Guddu at the Bhagwati Hospital. The F.I.R. indicates that the

same was recorded at 8.20 p.m. at Bhagwati Hospital. PW 10 Shivaji Shinde was the duty PI at Kandivali Police Station on that day and he proved the signature of PSI Gharge on the F.I.R. as well as on the inquest panchanama of the dead body which was also prepared at Bhagwati Hospital.

(g) On 4/12/2005 PSI Gharge arrested the remaining two accused Mohan and Omkar under an arrest panchanama. On 5/12/2005 PI Shivaji Shinde recorded the statements of Dhirajlal Shah, Raj Rajpal Vahi, and ASI Suresh Rane. On 6/12/2005 he recorded the statements of Bharati Narkar and Smt. Himala Shah. On 6/12/2005 accused Mohan gave a memorandum disclosing the place where he had kept his auto rickshaw and the said auto rickshaw was, therefore, seized and attached under a recovery panchanama. On 13/12/2005 PSI Shivaji Shinde recorded the statement of watchman Anilkumar Thakur. On 24/12/2005 he called SEO Kishor Chindaliya, two panchas and identifying witness Umesh Thakur for identification parade. They were sent to Thane Central Jail along with PSI Shri Kandalgaonkar. There the identification parade was conducted by S.E.O. Chindaliya. The identifying

witness Umesh Thakur identified all the accused. That after receipt of the post-mortem notes and C.A. reports, PSI Shivaji Shinde filed a charge-sheet against all the accused.

3. That in due course the matter was committed by the Magistrate to the Court of Sessions for trial. At the trial, the prosecution examined in all 10 witnesses to prove the charges against the accused. Of these, P.W.2 Guddu Rajaram Yadav and P.W.3 Umesh Baijnath Thakur were eye witnesses. P.W.1 Mahendra Ramashish Yadav was a panch witness examined to prove the inquest panchanama (Exh.16). He was also examined to prove the map of the scene of the offence drawn under panchanama (Exh.17). Two witnesses, P.W.4 Raj Wahi and P.W.5 Pruthpalsingh Juneja were examined as witnesses, but they did not speak about witnessing the actual assault. Of these, P.W.4 Raj Wahi was declared to be hostile as he did not support the prosecution case that he was an eye witness to the incident. P.W.6 Kishor Chindaliya, who was the S.E.O. and had held the identification parade was examined to prove the holding of the identification parade and the memorandum (Exh.29). P.W.7 API Mohd. Siraj Inamdar

was examined to prove the arrest of accused Mohan Rawat and Omkar Rawat under an arrest panchanama (Exh.27). He was further examined to prove the memorandum and discovery in relation to the rickshaw owned by Mohan Rawat which was attached under a panchanama (Exh.31 read with Exh.32). P.W.8 PSI Raji Patil was examined to prove the spot panchanama (Exh.34) and arrest panchanama (Exh.25) in respect of accused Alankar Rawat. P.W.9 Dr. Ramdas Laxman Sanap was examined to prove the post-mortem notes (Exh.38 Colly.). Lastly, P.W.10 PI Shivaji Bapu Shinde, who had conducted the investigation, was examined as the Investigating Officer and he also proved the signatures of his colleagues PSI Gharge and PSI Patil on various documents prior to his taking over of the investigation.

4. The defence of the accused was of total denial. They denied the incriminating evidence against them. Though they admitted that they were arrested, it was their case that a false case had been registered against them. On the basis of the oral and documentary evidence produced by the prosecution before the trial court, by the impugned judgment and

order, the trial court was pleased to convict and sentence all the three accused as stated hereinabove. In the circumstances, the accused have preferred the present appeal in this court.

5. We have heard the advocates for the appellants as well as the Additional Public Prosecutor and perused the entire record. In our view, for the reasons which are mentioned hereinbelow, the appeal requires to be partly allowed in the terms as specified hereinbelow.

6. The incident in question is said to have been witnessed by several persons, including P.W.2 Guddu Yadav. Guddu Yadav is the real brother of the deceased Jitendra. He is an educated person and a Chartered Accountant. He claimed that on 3/12/2005, which is the date of the incident, he was on leave. After lunch, at about 5 p.m., he went to meet his brother i.e. deceased Jitendra. He was chit-chatting with one Shivkumar Yadav. At that time one rickshaw came in front of the Gurunanak Niwas, where his brother used to work. He heard the voice of his brother Jitendra, "uncle do not park rickshaw in front

of the gate". He saw accused Mohan abusing his brother and, therefore, he intervened in the quarrel. When he and Shivkumar Yadav asked accused Mohan as to why he was abusing the deceased, accused Mohan threatened him. At that time, the two sons of accused Mohan i.e. accused nos.1 and 3 came running to the spot and starting beating deceased Jitendra by fist and kick blows. Accused Mohan also assaulted him. Deceased Jitendra tried to run away from the place, but accused Mohan caught him by his hand. His two sons beat him for about 10-15 minutes. The witness started shouting but sons of accused Mohan threatened him and hence nobody came for rescue. Deceased Jitendra fell on the ground and thereafter all the three accused sat in the rickshaw and went away from the place. That with the help of his relative Shivkumar and Umesh Thakur who was the Superintendent in-charge of the security in the said building. Jitendra was taken to Bhagwati Hospital, but when he was checked by the doctor, he was declared dead. Thereafter the police came to Bhagwati Hospital and this witness lodged his complaint to the police. His complaint was lodged at about 6.30 p.m. The witness proved the contents of his complaint (Exh.21), which

was treated as the F.I.R. in this case. That after inquest and holding of post mortem, the body was given for funeral. The witness identified the clothes of the deceased Jitendra which were worn by him at the time of the incident. He also led the police to the place of the incident at Gurunanak Niwas where the police prepared a map and a panchanama of the scene of offence. On perusing the cross-examination, there is not much which has been elicited to throw a doubt on the version given by this witness. He has stated that he and Shivkumar did not go to the rescue of his brother. That the accused were not carrying any weapons. That about 15-20 persons had gathered their. The only infirmity, which may be stated as material, is an omission of this witness to state before the police that the accused were beating deceased Jitendra for about 10-15 minutes. It was suggested that a thief had entered the society on that day and the said robber had assaulted the deceased Jitendra. Apart from the lack of any substantial infirmity in the evidence of this witness, we find that the version given by him is corroborated by his own F.I.R. which was lodged within one and half hours of the incident on the same day. The version given by him, as

relating to the assault, is fully corroborated. All the three accused are named in the F.I.R. as persons who had assaulted the deceased Jitendra. We thus find the evidence of this witness acceptable.

5. The second eye witness i.e. P.W.3 Umesh Thakur was a security Supervisor. He stated that he had been to Gurunanak Building to distribute wages to the deceased Jitendra Yadav at about 5 p.m. He saw that Jitendra was caught hold by accused Mohan Rawat near his neck and other two accused, who are sons of accused Mohan, were beating him with fist and kick blows. He specifically mentioned the presence of P.W.1 Guddu and one of his relatives at the spot. He saw the accused leaving the spot and also saw Jitendra fallen on the ground unconscious. He and P.W.1 Guddu took Jitendra in a rickshaw to Bhagwati Hosptial but the doctor pronounced him dead. On 24/12/2005 he was called to identify the accused in an identification parade and he identified all the three accused in the parade. In his corss-examination he admitted that he arrived at the spot late and as soon as he reached there, the accused left the deceased Jitendra Yadav. He saw Guddu and Shivkumar outside the gate and also

saw many persons gathered at the place of the incident and they had made a gherav around the injured as well as culprits. He stated that he entered the premises and after him Guddu and Shivkumar also entered. He stated that the culprits saw them entering and ran away. He made a phone call to Pruthpalsingh (P.W.5) who was the owner of the security agency and who came to the spot. Pruthpalsingh called the police on phone no.100 and the police came after some time. That till the police come, Jitendra was lying on the ground. The police did not made enquiry with him on the spot. This witness and Guddu put Jitendra in a rickshaw and took him to Bhagwati Hospital. Shivkumar was also with them. The police constable on duty at the Hospital did not make enquiry with him when they reached the Hospital but made some enquiries thereafter. He had told them the names of the culprits as Alankar, Mohan and Omkar. He denied that he told the names of the culprits to the E.P.R. Constable. He denied that he was not knowing the accused before the court prior to the incident by their faces and names. Only omission which was brought on record was regarding his not stating in his police statement that accused Mohan had caught

deceased Jitendra from behind and accused Alankar and Omkar were beating him on the stomach with fist and kick blows. He denied that he had learnt about the names of all the accused from P.W.2 Guddu. He could not say as to why this was so mentioned in the police statement and this contradiction was proved by the prosecution. As far as evidence of this witness is concerned, his statement was recorded by the police immediately on the date of the incident itself. It may be true that this witness who may not have known the residents of the nearby locality by name. The contradiction brought on record indicates that the names of the accused were not known to this witness, though he denied this fact. Further the fact remains that the actual assault is not an omission in his police statement. The omission only relates to the names of the assailants. It is in these circumstances that an identification parade has been held and this witness identified all the three accused in the Identification Parade. As regards the identification evidence, the identification of this witness of all the three accused is supported by the evidence of P.W.6 S.E.O. Kishor Chindaliya. No doubt the Special Executive Officer talks about identification by two

witnesses when, in fact, there was only one identifying witness. Yet, the fact remains that as far as the identification by PW 3 Umesh Thakur, there is no major infirmity in the evidence of the S.E.O.

6. It was sought to be vehemently argued that the station diary entry (Exh.35) indicated an assault by three persons. It also indicated that the deceased had taken to the Hospital by Umesh Thakur which leant credence to the evidence of P.W.2 Guddu that he was present at the spot. This was further corroborated by E.P.R. entry Exh.36. It was sought to be argued that these two entries should be taken to be the F.I.R. We do not agree with this submission. Both these entries are cryptic entries, which do not give any detail as to how the incident actually occurred. They seem to be exact copies of each other. In this case we cannot lose sight of the fact that the F.I.R. of Guddu as well as the statement of P.W.3 Umesh Thakur was immediately recorded on the same day by the police.

7. In the net result, we accept the evidence of the two eye witnesses relating to the assault on the deceased Jitendera by the three accused. The question

that remains is what offence is committed by these accused. Perusal of the medical evidence in this case indicates that no external injury was found on the deceased. The only internal injury that was found was described as under:-

> "Haematoma under the scalp, occipital area. The spleen was found to be ruptured posteriorly about 3 cm. x 0.5 cm. x 0.5 cm."

. The cause of death was given as "Haemorrhage and shock due to internal injuries to spleen and kidney". We have found that the version given by P.W.2 Guddu that the accused were beating the deceased for 10-15 minutes is an improvement. The story given by him appears to be an exaggeration. It is the prosecution case that it was accused Mohan who first abused deceased Jitendra. It is the prosecution case that accused nos.1 and 3 were not there initially and came at a later point of time. The eye witnesses whose evidence has been accepted have talked about the assault on the deceased by all the three accused. In our considered view all the three accused will, therefore, have to be convicted with the aid of

Section 34 of IPC. It is also our view that in the circumstances of the present case, taking into account that there was no external injury and that the prosecution has not specifically elicited from the evidence of the doctor that the internal injury which he found was sufficient in the ordinary course of nature to cause death and further taking into account that the incident in question occurred due to a sudden quarrel over the parking of a rickshaw and was preceded by abuse, we find that it would be fit and proper to convert the conviction from one under Section 302 read with Section 34 of IPC to one under Section 304 Part II read with Section 34 of IPC. As regards the offence under Section 504 read with Section 34 of IPC the conviction thereon, the same rests upon the evidence of the two eye witnesses whose testimony we have accepted. They have stated in their evidence as to how accused no.2 Mohan Rawat threatened the deceased even though a polite request was made by the deceased to the accused Mohan Rawat to avoid parking the rickshaw in front of the gate. The other two accused also said to have joined in the threats. We, therefore, agree with the conviction and sentence for the offence under Section 504 read with Section 34

of IPC. As regards the sentence, we feel that the interest of justice will suffice if all the accused are convicted and sentenced for a period of five years RI for the offence under Section 304 Part II read with Section 34 of IPC. We have taken this view as we found it unsafe to believe that the intention of the accused was to cause death. However, it appears that the blows given on the stomach were obviously forceful enough to cause grievous internal injury to the deceased Jitendra, including injury to the spleen and the kidney and we find that acts done by the accused can be said to have been done with knowledge that it was likely to cause death or to cause such a bodily injury as is likely to cause death.

8. The Advocate for the accused then vehemently argued that accused nos.1 and 3 were young boys, aged 18 and 21 years respectively. They had no criminal antecedents of any nature. The facts indicated that there was no pre-planning and, in fact, they had joined only when they found that their father was involved in a verbal abuse. In the view that we had taken, the offences for which the accused are now convicted, are not punishable with death or

imprisonment for life. Under the Probation of Offenders Act, 1958, having regard to the circumstances of the case, including the nature of the offence and the character of the offender, the court has the power to release the accused on probation of good conduct and instead of sentencing him to undergo the punishment at once, the court can direct that he be released on his entering into a bond with or without sureties to appear and receive sentence when called upon during such period, not exceeding three years and in the meanwhile keep peace and be of good behaviour. To consider as to whether the benefit of the Probation of Offenders Act, 1958 should be extended to accused no.1 and 3, we had directed the Advocate for the accused to file such an application on behalf of accused nos.1 and 3 and such an application being Criminal Application No.322 of 2007 consequently came to be filed. On this application, in our order dated 22/3/2007, we noted that the elder brother Omkar was born on 28/12/1984 and the younger brother Alankar was born on 11/10/1987. That the date of the incident was 3/12/2005 and, therefore, it was evident that both these accused had not attained the age of 21 years on the date of the incident. That

Section 6 of the Probation of Offenders Act, 1958 clamped restrictions on imprisonment of offenders under the age of 21 years. We, therefore, called for a report from the concerned Probation Officer. It appears that after our said direction, the Probation Officer visited the house belonging to the accused and made enquiries with the neighbours. The Probation Officer also visited the Kolhapur Jail and met both the accused. Vide his report, annexed with his forwarding letter dated 4/6/2007, he has reported that the people interviewed in the locality where the accused reside informed him that both the boys never misbehaved with anyone, they were never involved in any kind of fights, antisocial activities or were never rude to anyone. The boys were always busy in their studies and as their father being a rickshaw driver did not earn enough, the boys were also working to earn their daily bread. It is further mentioned that entire matter arose out of a verbal argument on the issue of parking of a rickshaw and both the parties turned hostile and started fighting, resulting in the death. The relatives of the applicants-accused Alankar and Omkar were also interviewed and they assured the visiting team that after the release of

Alankar and Omkar they will support both the brothers for their further education and better future. A visit to the police station did not indicate that accused nos.1 and 3 had any criminal record. The personal interview of the accused nos.1 and 3 was also taken at Kolhapur Jail and the Probation Officer, accused Omkar mentioned his desire to support his younger brother for further education and wanted to study and work to support his family. The younger brother Alankar did not speak much and was very depressed and that he seems to be a very shy and reserved person and was very attached to his mother. He also expressed a desire to study and to work with his uncle.

9. Taking into account the aforesaid facts, we find that it will be in the interest of justice to grant benefit of the Probation of Offenders Act, 1958 to accused nos.1 and 3 and in the circumstances, the following order is passed:-

(A) That the impugned Judgment and Order passed by the 5th Ad-hoc Additional Sessions Judge, Mumbai in Sessions Case No.178 of 2006

is modified and in supersession of the order of conviction and sentence imposed in the said judgment and order, the following order is passed:-

(i) Accused No.1 - Alankar @ Veer Mohan Rawat, accused No.2 - Mohan Harishchandra Rawat and accused no.3 - Omkar @ Mithun Mohan Rawat are found guilty of having committed offences under Sections 304 Part II read with Section 34 of IPC and for this offence they are all sentenced to undergo imprisonment for a period of five years each and also to pay a fine of Rs.1000/- each. In default of payment of fine, they will undergo RI for a further period of one year. They are also convicted for an offence under Section 504 read with Section 34 of IPC and sentenced to undergo RI for one year on this count.

(ii) All the accused will be entitled to the benefit of set off under Section 428 of Cr.P.C. and all the sentences of accused nos.1 to 3 shall run concurrently.

(iii) In so far as the sentences imposed upon accused no.1 - Alankar @ Veer Mohan Rawat and accused no.3 - Omkar @ Mithun Mohan Rawat, they are given the benefit of the Probation of Offenders Act, 1958 and in the circumstances, it is directed that their sentences will not be executed and will remain suspended on their entering into a bond of Rs.10,000/- each with one surety each in the like amount to appear and receive sentence if and when called upon for a period of three years. It is further directed that for a period of three years they will be be required to keep peace and be of good behaviour. That during this period of three years they will remain under the supervision of the Probation Officer i.e. Ms. Neeru Sharma and will report to her once a month on every first Monday of the month at Resource Centre for Child Protection, C/o Government Special Rehabilitation Centre for minor girls, Sion-Trombay, Deonar, Mumbai - 88. That during this period of three years they will maintain peace and be of good

behaviour, failing which the benefit granted to them will be liable to be withdrawn and if withdrawn by any further order of this court, they will be liable to undergo the sentence imposed upon them by this judgment and order.

. The appeal as well as the application stand disposed of accordingly.

(R.S. Mohite, J.) (B.H. Marlapalle,J.)